Tectonic Industries, Inc. *and* International Union, United Automobile, Aerospace, Agricultural Implement Workers of America (UAW) Local 376. Cases 39-CA-721, 39-CA-1179, and 39-CA-1311

30 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 18 March 1983 Administrative Law Judge James F. Morton issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.[3]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel filed exceptions to several of the judge's factual and legal findings. We note that the judge made certain inadvertent factual errors which we correct as follows. There is no evidence in the record to support the judge's statement that the Union's negotiating committee "harbored some resentment against Respondent" for the Respondent's 1979 position on providing Christmas turkeys to employees. The judge's statement that about 1 May 1979 "Respondent's president referred to Respondent's attorneys" the April 1979 agreement regarding pensions is less than fully precise: in mid to late April 1979, the Respondent's president telephoned his attorney regarding setting up a pension plan, but the first time he sent to his attorney a copy of the agreement, plus an outline of a typical United Auto Workers defined benefit pension plan, was by letter dated 21 November 1979. The Respondent's Vice President Afif did not tell Union Shop Chairman Silva that "all bets are off." Afif made that comment to a representative of the company which supplied the Respondent with uniforms. Barber testified that Afif's comments regarding the Respondent's financial records and the Union being bullheaded were made 30 March 1982, not 26 March 1982.

The language of the April 1979 collective-bargaining agreement does not appear to have given the Respondent "approximately a year to present the Union with a draft of a pension plan along UAW lines," as the judge characterized the contractual language. The pension plan clauses of the April 1979 contract and the Respondent's accepted 4 April 1979 settlement offer read in relevant part as follows: "The COMPANY and the UNION agree to establish a regular pension plan to replace the former profit sharing retirement plan. The basic plan agreed to a 6.00 per month per year of service for the first year, 6.50 the second year, and 7.00 the third year. The UNION and the COMPANY to work out the precise plan provisions within approximately one year after the signing of this agreement . . . . The effective date of this new pension plan will be January 1, 1976. . . ." (Arts. 31.1-31.2; 31.4); "Respondent proposes to replace the current profit sharing retirement plan for a regular pension plan with features essentially illustrated as per the attached UAW sheet dated December 13, 1978 B1 through B7. Final details to be worked out by Respondent's attorneys drawing on assistance from Union sources as required. The basic plan agreed to is $6.00 for the first year, $6.50 the second year, and $7.00 the third year. The effective date shall be January 1, 1976. . . ."

These inaccuracies in factual recitation and interpretation do not individually and collectively affect our adoption of the judge's legal conclusions to dismiss each of the allegations of the complaint.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In light of our affirming the judge's findings and conclusions, we deny the General Counsel's motion to reopen the proceedings, consolidate the instant case with Case 39-CA-1410, and schedule further hearing.

The General Counsel also filed a motion to defer decision and the Respondent filed an opposition thereto. We deny the General Counsel's motion to defer.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. On July 2, 1981, International Union, United Automobile, Aerospace, Agricultural Implement Workers of America (UAW) Local 376, herein called the Union, filed the unfair labor practice charge in Case 39-CA-721. On July 22, 1981, the General Counsel of the National Labor Relations Board, on behalf of the Board, issued a complaint in that case against Tectonic Industries, Inc., herein called Respondent. On July 31, 1981, Respondent filed its answer to that complaint. The basic issue presented by the pleadings in that case is whether or not Respondent has failed and refused, since about May 7, 1981, to negotiate with the Union for a pension plan to cover those employees of Respondent represented by the Union. That complaint further alleges, and Respondent's answer also denies, that Respondent's asserted failure to negotiate on that matter constituted a violation of Section 8(a)(1) and (5) of the National Labor Relations Act.

On May 24, 1982, the Union filed an unfair labor practice charge in Case 39-CA-1179 and amended it on June 18, 1982. On July 2, 1982, a complaint issued in that case against Respondent. On July 13, 1982, Respondent filed its answer to that complaint. The central issues, raised by the pleadings, in that case are:

1. Whether Respondent, in violation of Section 8(a)(1) of the Act, unlawfully interrogated its employees as to their support for the Union, announced new benefits for those employees, or engaged in other conduct to discourage their support for the Union.

2. Whether Respondent unilaterally instituted a tuition refund program for its employees, changed its medical and dental insurance program for them, or bypassed the Union in dealing directly with them, in violation of Section 8(a)(1) and (5) of the Act.

3. Whether the totality of Respondent's conduct in negotiations with the Union established that it had, in violation of Section 8(a)(1) and (5) of the Act, bargained with the Union with no intent of reaching an agreement with it on the terms and conditions of a renewal collective-bargaining agreement.

4. Whether a strike by employees represented by the Union was caused or prolonged by alleged unfair labor practices of Respondent.

On September 3, 1982, the Union filed the unfair labor practice charge in Case 39-CA-1311 against Respondent. On October 15, 1982, a complaint issued in that case. That complaint was amended at the hearing. Respondent's answer to that complaint, as amended at the hearing, placed in issue the following matters in that case:

1. Whether the Union made an unconditional application on behalf of 33 named striking employees, alleged to be unfair labor practice strikers, to return to work.

2. Whether Respondent, in violation of Section 8(a)(1) and (3) of the Act, unlawfully failed and refused to make nondiscriminatory offers of reinstatement to those 33 named employees.

The hearing was held before me in Hartford, Connecticut, on November 8, 9, 10, and 30 and on December 1, 1982.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and by Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Based on the pleadings as amended, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

It will be helpful to outline Respondent's overall operations and related matters in order to put in context the evidence presented in this case bearing on the discussions between Respondent and the Union about a pension plan for the unit employees and on the negotiations which took place in 1982 on a renewal collective-bargaining agreement.

Respondent is engaged in the business of extruding plastic sheets for sale to manufacturers of eyeglass frames. In the 1970s, Respondent's operations were located in an old building in East Berlin, Connecticut. Respondent then had three shareholders. In September 1976, friction developed among these shareholders which resulted in a suit by two of them against the third (now Respondent's president and its sole shareholder). Respondent was made a party to that civil action.

In 1980, Respondent moved its operations to its present facility, a new building in Berlin, Connecticut. That new facility cost in excess of $2 million and was heavily mortgaged. In 1981, its officials began to make numerous trips to Europe; the uncontroverted testimony offered thereon established that they were attempting to build up an overseas market but failed.

Respondent's sales in the 1970s had been increasing substantially from year to year, and its profits too. It was obviously on the expectation that this trend would continue indefinitely that Respondent undertook the construction of its present facility. In 1976 and 1977, when Respondent's employees were unrepresented, it had in effect a profit-sharing plan. However and notwithstanding that its profits were increasing, it made no contributions to that profit-sharing plan in 1976 and 1977. It was then "hoarding" its profits in anticipation of expenses to be incurred in the erection of the new building and for future business expenses.

On November 8, 1978, the Union was certified in Case 1-RC-15902 as the exclusive collective-bargaining representative of the approximately 35 full-time and regular part-time production and maintenance employees, including lab and sample technicians, employed by Respondent but excluding all office clerical employees, professional employees, managerial employees, foreman, guards and supervisors as defined by the Act.

On its certification, the Union entered into negotiations with Respondent for a collective-bargaining agreement covering that unit of employees. Agreement thereon was reached on April 4, 1979, when Respondent's president, Charles Merritt, entered into the negotiations directly with the Union's representatives. Prior to that meeting, Respondent and the Union had agreed on many terms and conditions of their first contract. The items unresolved prior to April 4, 1979, involved the Union's demands that a pension plan be established along "UAW lines" in lieu of the profit-sharing plan Respondent had had in force, a demand by the Union that Respondent furnish uniforms for the unit employees, a further demand that the employees receive cost-of-living adjustments in their wage rates (COLA), and finally a demand that Respondent continue to provide each unit employee with a gift turkey each Christmas. Respondent's president acceded to the first three of those demands but refused the last. The Union dropped its demand as to the "gift" turkeys but, as was evident from more recent negotiations, the Union's negotiating committee harbored some resentment against Respondent for the position it took in 1979 on that demand.

It is undisputed that numerous unresolved grievances had "piled up" since the collective-bargaining agreement was signed in early 1979. In February 1981 the Union met with Respondent's president to voice its concern on this matter and to complain about related matters, including claims that Respondent was not honoring the agreement in the matter of furnishing uniforms in a timely manner, in subcontracting out janitorial work, and in holding up agreement on job descriptions. Respondent's president testified that he expressed concern at that meeting over "material efficiency." His account thereon appeared confused in that he related that that concern antedated the Union's certification while later stating that the problem began in 1979 (obviously after the Union's certification).

By mid-1981 as is evident from the data set out below, Respondent's operations had taken a serious turn downwards. Respondent's president characterized the matter, in employee meetings held then, as "a survival situation." He told them that the "we versus they" syndrome must

be eliminated if Respondent is to survive. He reported to them that "going through channels" did not work.

In June 1981 Respondent's president met with union representatives and told them he wanted the Union to hold off on grievances and on its demand for job descriptions. When the Union replied that it wanted Respondent to abide by the contract then in force, Respondent's president answered that Respondent "won't have this problem, come April." The quote is an obvious reference to the fact that the contract was scheduled to expire in the following April.

The Union requested Respondent about September 1981 to let it examine Respondent's financial records to verify that Respondent was then in a "survival situation." Respondent rejected that request.

In the fall of 1981, Respondent cut the salaries of its managerial and office staff and reduced their vacation, holiday, and fringe benefits. In December of that year, it settled the lawsuit, begun in 1976 by two of its three shareholders. Under the settlement terms, Respondent delivered title to them of its old building, with a book value of $600,000, and agreed to pay each of them several hundreds of thousands of dollars in exchange for a covenant not to compete. As is also obvious, Respondent had incurred considerable legal expenses in that lawsuit.

Respondent's president testified that, in 1981, the recession took place and Respondent's business slowed down markedly. Its gross sales fell from $9.3 million in 1980 to $5.6 million in 1981. In 1981 Respondent lost $580,000 in its operations. Taking into account other disbursements it was required to make, Respondent lost a total of $950,000 in the fiscal year ending August 31, 1981. In the 6-month period ending February 28, 1982, Respondent showed a $265,000 loss. Its president then testified without contradiction that Respondent has since March 1, 1982, incurred further losses.[1]

As of the hearing, Respondent has been able to receive its raw materials from suppliers on a COD basis coupled with an additional payment designed to reduce its large indebtedness for prior shipments. Respondent has also effected several managerial changes since 1981. On the recommendation of bank officials, a consultant was brought in during February 1981 to ensure that Respondent's records were orderly. He left in early August 1981 shortly after another consultant was brought in. That second consultant became vice president of operations and served in that capacity until January 1982. A third individual then took over the responsibility for Respondent's manufacturing operations and served until August 1982. Respondent's present plant manager has served in that capacity since January 18, 1982.

B. *The Pension Plan*

The General Counsel contends, as alleged in the complaint in Case 39-CA-721, that Respondent has, since about May 7, 1981, failed and refused to negotiate with the Union respecting the Union's request of Respondent to negotiate a pension plan for the unit of employees represented by the Union. Respondent asserts that it has fulfilled its bargaining obligations in every respect in its discussions with the Union on the subject of a pension plan.

As noted earlier, Respondent and the Union entered into their first collective-bargaining agreement in early 1979. By its terms, that contract went into effect on April 5, 1979, and continued in force until April 5, 1982. Article XXXI of that contract was entitled "Pension Plan." Subsection 1 thereunder provided that a regular pension plan would be established to replace the former profit-sharing retirement plan. Subsection 2 provided that "The basic plan agreed to is $6.00 per month per year of service for the first year, $6.50 for the second year and $7.00 the third year. [Respondent and the Union will] work out precise plan provisions within approximately one year after the signing of this agreement."

Those subsections of article XXXI of the 1979-1982 contract were essentially but restatements of Respondent's settlement offer of April 4, 1979, which was accepted by the Union and which read in relevant part substantially as follows:

> Respondent proposes to replace the current profit sharing retirement plan for a regular pension plan with features essentially illustrated as per the attached UAW sheet dated December 13, 1978 B1 through B7. Final details to be worked out by Respondent's attorneys drawing on assistance from Union sources as required. The basic plan agreed to it $6.00 the first year, $6.50 the second year and $7.00 the third year.

It was that language from the April 4, 1979 settlement offer that Respondent's president referred to Respondent's attorneys about May 1, 1979. Respondent's attorneys prepared three different drafts of the pension plan for Respondent and each time suggested to Respondent that each of those drafts be forwarded to the Union for its comments. The first draft was dated April 10, 1980; the second, May 6, 1980; and the third, July 1, 1980. The first two drafts followed closely the UAW sheets referred to in Respondent's April 4, 1979 proposals. These drafts, for some unexplained reasons, were returned by Respondent to its attorneys for revision. As discussed below, the third draft was submitted to the Union and it voiced objections thereto, also as discussed below.

The Union's representatives, throughout 1979 and early 1980, repeatedly asked Respondent to provide them with the draft of the pension plan that had been agreed upon. Each time Respondent replied that the draft was in the process of being prepared or was being revised by its attorneys.

In July 1980 Respondent gave the Union a 22-page typewritten document which contained 17 separate articles which comprised its draft of the proposed pension plan. The Union forwarded that draft to an actuarial consultant at the office of its International. On October 1, 1980, the actuarial consultant wrote the Union and set out 24 separate points in the draft submitted by Respondent which, in his opinion, needed to be changed in order

[1] The General Counsel at one point sought to challenge Respondent's evidence thereon by highlighting the fact that Respondent's records showed that large sums were expended by Respondent's officials on overseas travel. When it became evident that these expenses were related to a vain effort to build up markets overseas for Respondent's products, the General Counsel no longer pursued that course.

to conform to the agreement the parties reached on April 4, 1979. For example, the actuarial consultant noted that article XI of the proposed pension plan by Respondent provided that full responsibility for the administration of the plan shall be in the hands of Respondent. According to the UAW actuarial consultant, "the typical UAW pension plan will provide for a Company and Union board of administration." As a further example of the observations made by the actuarial consultant, and one which is immediately relevant to ensuing discussions as noted below, is that set out at comment 14 in his October 1, 1980 report. There, he observed that the plan drafted by Respondent provided that the spouse of a deceased annuitant shall receive 50 percent, not 60 percent, of the annuity on the death of the annuitant. The plan drafted by Respondent had provided for but a 50-percent survivorship instead of the 60 percent specified in the typical UAW plan referred to in the settlement offer accepted on April 4, 1979, as discussed above.

The Union forwarded the observations of its actuarial consultant to Respondent in October 1980.

In September 1980, Respondent had hired Bruce Meek as its vice president of human resources, apparently a newly created position. One of the responsibilities given Meek was to set up the pension plan in conjunction with the Union. He met with the union representatives in October 1980 and it was at that point that he received from them the written comments of the UAW actuarial consultant. Thereafter, Meek reviewed the corporate files on the pension plan. On January 14, 1981, he wrote a letter to the Union's business agent and attached to that letter a detailed response to the comments offered by the UAW actuarial consultant. Thereby, Respondent accepted a number of the observations of that actuarial consultant as valid and, on that basis, revised its proposals to be in accord with the related comments suggested by the Union. As to others of those comments, Respondent noted that ERISA provisions obviated the need for the suggested revisions thereon. On the remaining comments, Respondent suggested that further discussions between Respondent and the Union would be needed to get final agreement. Respecting the comments on the spouse survivorship percentage, Respondent wrote that it was of the view that the survivorship percentage should remain at 50 percent and should not be 60 percent as the Union wanted.

Meek testified that, in early April 1981, he met with union representative Robert Madore who advised him that the Union was preparing its response to Meek's views. Agreement was reached then to hold a meeting in late April between Respondent and the Union to discuss the pension plan. The late April meeting was canceled, apparently by Meek for business reasons and it was not until May 1981 that the parties met again to discuss the pension plan.

The General Counsel presented three witnesses in support of the allegation that Respondent, since May 7, 1981, failed to bargain collectively with the Union respecting its pension plan proposals. The Union's business agent, Robert Madore, testified that about May 26, 1981, a meeting was held to discuss the Union's objections to the draft of the pension plan that Respondent had sent it in July 1980. That draft, inter alia, provided for a survivorship option of 50 percent of the annuity and not 60 percent as is usual in UAW pension plans. Madore testified that the Union voiced this objection to Respondent's vice president, Bruce Meek, who told him that Respondent would offer only 50 percent. On cross-examination, Madore testified that the Union then offered to accept a 55-percent survivor's option and that Meeks rejected that offer. Madore further testified that he then told Meeks that the Union would file an unfair labor practice charge against Respondent. He testified also that Meek then closed the meeting by saying that the Union could take the matter to "Court."

The General Counsel's second witness, the Union's shop chairman, Robert Silva, testified that that meeting occurred in about April 1981. He related that the Union's International representative Leonard Dube told Meek the survivorship percentage should be 60 percent and that Meek replied that Respondent was offering 50 percent. Silva testified that Dube told Meek that that matter "wasn't a negotiable item" and that after "argument back and forth" Meek closed his books and said the matter would be settled in court.

The General Counsel's third witness, Raymond Ziegler, testified that he attended a meeting in May 1981 as a grievance committeeman for the Union, that Dube and Meek got into an argument over the death benefit provisions and "what approximately 60%" meant, that Dube told Meek not to "pussyfoot around," and that Meek got upset, slammed his notebook closed, and ended the meeting by telling the Union that Respondent would see it in court.

Meek testified for Respondent respecting that meeting. His account is generally in accord with that of the witnesses called by the General Counsel except that he said it took place on May 7, 1981, and that he denied that the Union offered to compromise at 55 percent. I credit Meek's account because the Union's shop chairman testified that Meek was told that the 60-percent figure was not negotiable.

The Union filed the unfair labor practice charge in Case 39–CA–721 on July 2, 1981. In December 1981 the Union's representatives met with various representatives of Respondent, including its labor counsel, to discuss a large number of outstanding grievance and arbitration matters. In the course of that meeting, Respondent's labor counsel informed the Union, respecting the pension plan, that he would get back to them after the first of the year.

Negotiations for a renewal collective-bargaining agreement began in early 1982. During the course of those negotiations, many meetings were held between the Union and Respondent. At some of those meetings, the subject of the pension plan was discussed. Testimony thereon is included among the discussion in the next subsection.

C. Negotiations for a Renewal Contract

The General Counsel contends that Respondent participated in negotiations with the Union for a renewal contract in early 1982, but that it did so with no intention of reaching agreement with the Union as to the

terms thereof. In support of that contention, the General Counsel relies on the evidence discussed in this subsection and also on the evidence discussed in other subsections. In essence, the General Counsel asserts that Respondent engaged in stalling tactics; that it delayed inordinately the pension plan discussions as reported in the preceding section; that Respondent went through only the motions in early 1982 of negotiating a renewal contract; that, in the course of discussing the terms of a renewal agreement, Respondent presented a final offer to the Union which was substantially less in value than a previous offer it had made; that Respondent negotiated directly with the unit employees while bypassing the Union in an effort to undermine the Union's bargaining status and engaged in other coercive conduct towards that aim. Respondent maintains that the totality of the evidence demonstrates that it was making every reasonable effort to reach agreement with the Union and that it was the Union which took an unyielding position during the 1982 negotiations. In this subsection, the facts bearing on the 1982 negotiating meetings are set out.

As noted earlier, the first collective-bargaining agreement reached by the Union and Respondent was executed in 1979 and, by its terms, was scheduled to expire on April 5, 1982. On January 22, 1982, the Union wrote Respondent requesting extensive information it said it needed to formulate its contract proposals. The information it sought was set out on a questionnaire enclosed with that letter. On February 17, 1982, Respondent sent the Union the completed questionnaire and confirmed arrangements made in the interim by which the renewal contract negotiations would begin on February 26, 1982, at a location near Respondent's plant. At the hearing before me, the parties stipulated that Respondent and the Union met for collective-bargaining negotiations on February 26; on March 5, 8, 11, 15, 19, 23, 24, 25, and 31; and on April 1, 2, 4, and 5, 1982. They stipulated also that the unit employees went out on strike on April 5 and that negotiations were held also on April 16, May 11, June 19, July 9, August 27, and October 28, 1982. Testimony was received as to what transpired between the Union and Respondent's representatives during the course of those negotiations. No material conflicts were contained among the respective accounts.

At the February 26 negotiating session, the Union submitted to Respondent its contract demands, set out on five typewritten pages. The Union and Respondent also established negotiating subcommittees on that date, one of which was responsible for the review of written job descriptions for language changes and, where applicable, upgradings. Respondent and the Union agreed to first discuss "all the non-economic items" and to reserve the money items for discussion "close to the conclusion of negotiations."

The next meeting was held on March 5. At that meeting, a consultant retained by Respondent made a presentation, using charts to show that Respondent had suffered significant monetary losses over the preceding 3 years, to show that foreign competition had made serious inroads on its sales, and to demonstrate that immediate productivity efficiency had to be achieved. Respondent advised the Union that its financial books were available for examination by the Union's auditors and that it was making this offer so that the Union could satisfy itself as to the precariousness of Respondent's financial condition. Respondent furnished the Union, pursuant to the Union's request, with copies of the charts it had used in making its presentation. Respondent also gave the Union its proposed contract revisions. Those proposed revisions are now summarized:

1. To remove the laboratory and sample employees from the bargaining unit (Respondent later withdrew that proposal and the unit remained unchanged).

2. No change in the union-security or dues-checkoff provisions or the management-rights provisions.

3. Respondent may hire 3 college students as trainees for supervisory positions instead of 1 such trainee for every 25 bargaining unit employee. (There were then about 35 bargaining unit employees in Respondent's employ.)

4. A reduction in the number of holidays from 12 to 9 each year.

5. The leave of absence section to be modified to provide that such leave shall be granted only in emergencies and apparently not merely on request.

6. Employees may be transferred temporarily to a different job without loss of pay.

7. Language changes in the grievance/arbitration procedures, e.g., proposed reduction in the number of stewards who would be authorized to leave their work areas to handle grievances during working hours.

8. The use of the American Arbitration Association as the arbitrator rather than a mutually acceptable arbitrator.

9. Language changes in the seniority and layoff sections of the contract, e.g., a proposal that Respondent shall give only 3 days' notice of layoff instead of a week's notice.

10. A proposal that employees who accepted a new job pursuant to the bidding procedure may not bid again on another job for a 3-month period.

11. Language changes in certain of the subsections governing hours of work, break periods, and other "non-economic areas."

12. The extension of the probationary period for new employees from 60 to 90 days.

13. A reduction in vacations, e.g., to 3 weeks for employees with 10 years of service, instead of 4 weeks' vacation.

14. A 3-year wage freeze.

15. Elimination of COLA.

16. Respondent will contribute 50 percent towards the health insurance premiums, instead of paying it all.

17. The parties will revoke their agreement to establish a regular pension plan and, instead, agree to reinstate the former profit-sharing retirement plan.

On March 30, 1982, auditors engaged by the Union reviewed Respondent's financial records. Respondent's president testified without contradiction that, at the conclusion of that review, the Union's auditor told him that Respondent's financial condition was so desperate that he did not understand how Respondent could be still in business. The UAW auditor then prepared a detailed

analysis of his examination and provided the Union's negotiating committee with a copy of that report. The parties are in agreement that that report accurately reflects Respondent's financial condition as of that time. A copy of that report was received as an exhibit at the hearing before me.

On March 8, the third negotiating session, Respondent and the Union reviewed and discussed their respective proposals and reached oral agreement as to certain minor items, e.g., changing the wording of the contract provisions governing washup times.

No progress was made at the March 11, 15, and 19 meetings. Respondent, on March 19, asked the Union to list the items it wanted to have included in the pension plan agreement. The Union provided Respondent with a list of those "open items" at the next negotiating session, March 23.[2] Respondent then advised that it would review those "open items." It also informed the Union that it "could not deal with a fixed cost" and preferred "a profit sharing plan." Respondent suggested it may take the form of a trust, of an IRA or a union-administered pension plan with Respondent's contributions being fixed on a profit basis.

In the negotiations on March 24 and 25, some tentative agreements were reached, e.g., Respondent withdrew its proposal to reduce the mileage compensation from 20 cents to 15 cents and thus agreed with the Union's position thereon.

The negotiating meetings on March 29 and 31 initially had to do with the arranging for the Union to review Respondent's financial records and arranging further discussions thereon. By then, the Union had obtained a strike authorization from its membership and the strike deadline was approaching. In the negotiations during the first several days of April, some minor language changes were agreed on. Respondent was insistent that wages be frozen for 3 years, that fringe benefits be reduced, and that the pension plan agreement be abandoned. Respondent offered to turn over to the Union $40,000 it had accrued on its books, the extent of its liability to date under the original pension plan agreement. It coupled that offer with a proposal that a trust fund for a profit-sharing arrangement be set up with that contribution. The Union rejected that proposal.

At the negotiating session on April 2, the Union's representative asked Respondent whether, under its wage freeze proposal, the employees would received the rate of pay set forth in the then current contract or whether they would receive the wage rate they were then being paid, which included a COLA of 14 cents an hour. Respondent replied that the employees would continue to get that COLA amount. Respondent then proposed a wage freeze for the first year of the renewal contract (as noted above, its original proposal was for a three year wage freeze), a 5-percent wage increase in the second year provided the plant reached a productivity level of 35 pounds of production per employee per hour, and a 7-percent increase in the third year provided that a 40-pound per productivity level was reached. The Union caucused at that point and then stated that it would take the then existing contract as is with a wage freeze for 1 year. Respondent rejected that proposal.

In early April the negotiating subcommittee on job descriptions, comprised of two members from Respondent and two members from the Union, reached agreement on revised job descriptions for most of the job classifications in the plant. A substantial number of the jobs were reclassified upwards. In effect, that revision would enable the employees filling those jobs to receive a higher hourly rate of pay even while the contract rates were frozen. For example, the job of the Union's shop chairman, an extrusion operator, was reclassified to a pay level which was $1.25 more than the wage rate he was then receiving.

On April 4 the Union counterproposed a 1-year extension of the contract, with a wage reopener at the expiration of that year. Respondent rejected that counterproposal.

On April 5, the parties resolved outstanding "language issues," e.g., on the grievance-arbitration procedures and on attendance policies. Respondent advised the Union that it would be agreeable to a 2-year extension of the contract, with a reopener on wages and fringes at the end of those 2 years. It proposed further that the job classifications agreed on by the subcommittee would go into effect during the second year of that 2-year contract. That would have resulted in a number of the unit employees being upgraded and their receiving increments based on the fact that their jobs had been so reclassified. Respondent further proposed that it would drop its profit-sharing arrangement but would offer a pension plan with specific amounts contributed to it and, in addition, supplemental amounts based on profits made. The Union's president vigorously rejected Respondent's revised proposal.

A strike ensued as discussed below. The Union and Respondent met several times since but have made no progress, as further discussed below.

D. *Alleged Unlawful Unilateral Changes; Alleged Unlawful Efforts to Undermine the Union as Bargaining Agent*

The General Counsel contends that, in early 1982, Respondent engaged in conduct away from the bargaining table which was in violation of its obligation to bargain collectively with the Union in that it was aimed at undermining employee support for the Union. Respondent maintains that all of the asserted unlawful acts were undertaken to promote a harmonious relationship with the Union and were done with the Union's approval, express and implied.

The acts complained of by the General Counsel and dealt with in this subsection took place shortly after Respondent engaged its third business consultant in less than a year to assist its president in operating its business. That individual, Rafat Afif, was hired by Respondent on

[2] The General Counsel suggests that Respondent's request for a list of "open items" was but a delaying tactic. It should be noted that Respondent's newly hired vice president Afif was handling the negotiations and that his request for such a list could enable him to expedite the pension fund discussions. By that time, the individual who had handled the pension fund matter for Respondent, Bruce Meek, had resigned and was at work in another State.

January 4, 1982, as vice president in charge of operations. He left Respondent's employ in September 1982. The complaint in Case 39-CA-1179 alleges that Respondent, through Afif, (a) unlawfully interrogated its employees in late March and early April 1982; and (b) in 1982, began to give employees cakes on their birthdays, to give prizes to employees with good attendance records, and to offer them tuition refunds and better plant uniforms. The General Counsel contends that, at the same time it engaged in that conduct, Respondent was telling the employees that it was the Union's fault that working conditions were not better. The complaint also alleges that Respondent unilaterally instituted the tuition refund program, and unilaterally modified its health insurance benefits and bypassed the Union in dealing with employees respecting collective-bargaining matters.

The Union's shop chairman, Robert Silva, testified that in early January 1982 he first met Afif and that, in a discussion then, Afif said that he wanted to upgrade four or five job classifications and asked to meet with the Union's president and its representative. Afif also told Silva then that he wanted the Union to take credit for the upgrading as that would be a feather in the Union's cap. According to Silva, Afif also asked to have a meeting with the union stewards and committeemen.

Afif's account of that discussion is somewhat more detailed. He testified as follows. He met Silva on the work floor shortly after Afif began his employ with Respondent and Silva asked then to talk with him. They met in one of the plant offices where Silva gave him a detailed rundown of the problems the Union was having with Respondent. Afif told Silva that he needed a couple of days to find out more about those matters and asked him to, in the meantime, set up a meeting with the Union's committeemen.

A week later Afif met with Silva and with the Union's shop stewards and committeemen. Afif testified as follows respecting that meeting. He began by telling them that he had discussed with Silva the many areas of dissatisfaction Silva expressed to him. Afif related that he told Silva and the others that it was obvious that Respondent had problems as productivity and morale in the plant were poor. He invited their comments. Afif testified that, in the ensuing discussion, complaints were made that Respondent's absenteeism policy was too strict and that grievances were unresolved for too long. Afif responded to them by saying that the problem seemed to go both ways. He noted specifically that Respondent had agreed with the Union to provide uniforms to be worn by the employees while at work and that, although those uniforms were given them, only a limited number of employees were wearing them. Afif recalled that one of the stewards responded that the employees did not get enough uniforms and that the white shirts Respondent provided got dirty too easily.

Shop Chairman Silva's account essentially parallels that of Afif. Silva testified further that Silva offered to take up the matter of the uniforms with the company that supplied them to Respondent and that he told Afif that it was the Union that had originally contacted the uniform company, apparently back in 1979. Afif responded that he would take care of it.

Afif testified that in late January 1982 he told Silva that he had arranged with the uniform supply company to have one of its salesmen come down to the plant to meet with the employees. Afif testified that he told Silva that he would like Silva to be present with that salesman when the employees looked over the display of uniforms and Afif assured Silva that no one from management would be present at that time. Silva did not refer to any such conversation when he testified. I credit Afif's account as it is undisputed and as a notice was posted on the employee bulletin on January 25, 1982, notifying them that they could meet in small groups with a representative of the uniform supply company informing them that "Tectonic Management will not attend those meetings so that open and frank discussions can take place." Further, one of the General Counsel's witnesses testified that, when he looked at the display of uniforms available, Silva was present in the room with the salesman from the uniform company.

Silva testified that, a few days after the employees examined the uniform display, Afif told him that employee response was "quite good" and that he was going ahead with the uniform program. Silva related that he then voiced an objection. Silva stated that the uniforms had not been supplied to the employees in accordance with the terms of the contract then in force, that the employees had taken an economic loss, and that the Union "would be looking for this ten month loss at negotiations." Afif's account of that discussion is that he told Silva that he advised the uniform supply company that the Union was agreeable to the changes in the uniform program and that a contract was being drawn up by the uniform company. At that point, according to Afif, Silva stated that Respondent owed the men $10,000 for past uniforms not supplied and that that matter would be brought up at the negotiating table. Afif testified that he responded that he thought they had already negotiated the new uniform contract and Silva repeated that that matter would surely be brought up at the negotiating table. Afif testified that he then advised Silva at that point that "all bets are off."

Afif testified that on February 4, 1982, he and Plant Manager Anderson met with the Union's president, Philip Wheeler, with its business agent, Robert Madore, and with its shop chairman, Robert Silva. Afif's account thereon is as follows. At the beginning of the meeting, Wheeler stated that he felt that it was wrong for Respondent to have talked about the new uniform program with the employees and in giving out birthday cakes and tuition refunds. [Those matters are discussed below.] Afif responded that he had in his past employment always dealt with a union's chief steward on such matters and that he had done so respecting the uniform program and other matters with Silva. He asked Silva to confirm this to Wheeler and Madore; Silva did so. The Union's business representative, Madore, testified that, when the Union brought up the uniform change matter at the February 4 meeting, Afif never said that he had discussed the uniform changes with Silva but simply turned and

looked at Silva when the subject was brought up. Neither Silva nor plant manager Anderson testified as to the discussion of the uniform program at the February 4 meeting. I credit Afif's account.

Afif testified that he agreed to hold up on the new uniform program until the Union's president had talked the matter out with Silva. According to Afif, he asked Silva several days later if it would be all right to have a tailor come in to measure the employees. Silva said it was all right and, on that basis, a notice was sent to the employees. They were later measured for the uniforms. Silva did not specifically controvert that testimony. He did state that he had never at any time told Afif that he could implement the uniform program change. I credit Afif's account as it was consistent with his whole approach in dealing with the Union upon his assuming responsibility for managing Respondent's operations.

On February 25, 1982, Afif signed an agreement with the Mechaics Uniform Supply Company. Under that contract, the cost to Respondent was to be increased by about $6 per week for each employee as a result of the increase in the number of uniforms to be furnished them. That new program was never put into effect as the testimony of both Afif and Silva discloses. The contract Respondent had signed with the uniform supply company provided that it would be void "if the Union votes out the uniform program."

The General Counsel further contends that Respondent unilaterally granted benefits to employees in derogation of the Union's status as their representative by having, in early 1982, instituted a practice of giving employees cakes on their birthdays, by granting prizes to encourage better attendance at work, and by offering them a tuition refund program to induce them to continue their education. Respondent asserts that those items were fully discussed with the Union before they were put into effect.

The General Counsel's first witness in this area, Robert Madore, testified that the Union learned that the Respondent had instituted these benefits when it received a copy of a letter Respondent had sent to its employees announcing those benefits. Madore testified further that, at the negotiating session on April 4, 1982, the Union protested to Respondent that those changes should not have been put into effect without having first been discussed and approved by the Union at the bargaining table.

The General Counsel's second witness respecting these items, Clayton Barber, testified that Respondent gave him a cake on his birthday in late March 1982 and that this was done without any prior announcement. Barber testified further that on March 4, 1982, he and other employees received a letter from Respondent's vice president, Rafat Afif, which advised them that Respondent would conduct a raffle for a 12-inch black and white television set on April 6, 1982, and that the number of raffle tickets to be given an employee would increase as his attendance record approached 100 percent. Afif's March 4 letter also notified them of a tuition refund program Respondent was instituting to encourage its employees to become better trained. Afif's letter separately noted that Respondent and the Union were in the course of negotiating a renewal contract and it urged employees to disregard any rumors that may be circulated. Afif stated in that letter that Respondent and the Union had agreed to keep their negotiations "confidential."

The General Counsel's third witness on these points was the Union's shop chairman, Robert Silva. He testified that the first time he had had notice of Respondent's tuition refund program or its offering a television set to improve attendance occurred on March 4, 1982, when Respondent's vice president Afif discussed with him that morning the issuance of the March 4 letter, discussed above. Silva testified that he told Afif then that the items referred to in that letter were economic items that should be discussed at the negotiating table and that the TV raffle referred to a matter which was presently in the grievance procedure. Silva testified also that he told Afif that Respondent could not put the TV raffle plan into effect and noted that the raffle was scheduled to take place the day after the contract, then in effect, was scheduled to expire. Silva testified that Afif told him that Respondent intended to follow through on the TV raffle plan. Respecting the initiation of the birthday cake program, Silva testified that, about the end of January 1982, Afif approached him on the work floor and told him about "his new proposal to turn the company around by offering cakes to the employees." Silva was one of the employees who later received a birthday cake.

The General Counsel's next witness respecting these alleged unilateral benefits was Robert Hyatt, one of the unit employees now on strike. He testified that on his birthday, February 9, 1982, Afif brought him a cake and wished him a happy birthday. Another of the General Counsel's witnesses, Ray Ziegler, testified that he received a birthday cake from Respondent in early 1982.

Afif testified as follows respecting the birthday cake program and the other matters involved in this subsection. In the meeting Afif had with Silva and the other stewards shortly after he entered Respondent's employ, he talked with Silva about the complaints registered with him and said that something should be done about the complaint from a union steward that Respondent had failed to show any recognition of the contributions by employees. Afif suggested that it would be a good idea to "bring some fun in the place" and he told Silva that he thought that Respondent ought to give out birthday cakes. Afif testified that Silva responded that it was about time that Respondent would recognize the employees. The only time the birthday cakes were mentioned during the ensuing contract negotiations took place when the Union's bargaining representative Robert Madore stated that the Respondent should scrap its birthday cake program and give the employees turkeys instead.

Respecting the tuition refund program, Afif testified that he talked to Silva in January 1982 and told him that four employees whose names he gave to Silva (those individuals were named in the complaint as unfair labor practice strikers) had asked Afif about a tuition refund program. Afif testified that Silva told him that that matter had been discussed a long time ago but nothing had ever been done about it. Afif quoted Silva as saying

that he thought it was a good idea and, on that basis, Afif testified that he told Silva that Respondent would do it. Afif testified that it was on this basis that he issued the March 4, 1982 letter. Afif further testified that, on February 4, the Union's president, Wheeler, asked him about the tuition refund program and that Afif explained it to him. Afif stated that at no time did the Union indicate to Respondent that it did not want a tuition refund to go into effect. Only two employees have filed applications to participate in the tuition refund program. Afif estimated that any benefits to be paid thereunder would cost Respondent several hundred dollars at most.

In the General Counsel's rebuttal case, union representative Robert Madore testified that he first learned about Respondent's giving employees cakes after the meeting the Union had with Respondent "when the subject of the uniform program came up" and that at no time did he tell Afif to go ahead with a plan to give employees birthday cakes. Silva also denied that Afif told him that any employees had approached Afif concerning the tuition refund program. Silva testified too that he, himself, never told Afif to go ahead and implement that program. Further, Silva testified that there had never been any talk prior to January 1982 with any of Respondent's representatives concerning a tuition reimbursement program and that at the February 4, 1982 meeting neither the subject of birthday cakes nor the subject of tuition refunds was discussed.

There is no material credibility issue to resolve. Afif had made known his readiness to improve morale and production and proposed the TV raffle, the tuition refund program, and birthday cake arrangement in discussions with the Union's shop chairman. The Union never told him not to implement those programs but in April informed him in essence that he should have first received the approval of the Union's president and its business representative. In any event I credit Afif's account. Had the Union genuinely objected to Afif's proposals respecting the giving of birthday cakes, the use of a TV raffle to reward good attendance, or the offering of tuition refunds, it would likely have objected in writing—in response to Afif's written notices thereon.

The General Counsel alleges, and Respondent denies, that Respondent unlawfully interrogated its employees.

Clayton Barber testified for the General Counsel respecting that allegation as follows. On March 26, 1982, Respondent's vice president Afif came to Barber's work location and asked him if he had heard how negotiations were progressing. Afif in substance asked why the Union's representative Madore was doing all the talking for the employees; Afif wanted to know why the employees on the Union's negotiating committee, Bob Silva and Bill Sturtevant, were not talking. Afif brought up the subject of insurance benefits and Respondent's proposal during negotiations that the employees pay half the cost of those benefits. Afif asked if the employees would go along with paying both that cost and also with a wage freeze. Barber responded that he would not go along with those proposals. Afif then alluded to the fact that the Union had examined Respondent's financial records. Afif asked what Barber thought of that. Barber responded that the poor economic condition of Respondent came as a surprise to all the employees. Afif then stated that the negotiations were not going anywhere, that the Union was bullheaded, and that nobody wanted to compromise.

Barber testified further as follows respecting a conversation he allegedly had with Afif on March 30. Afif told him then that time was running out and Afif wanted to know what was wrong with the Union's negotiating group as they did not want to meet on weekends. Afif stated that if Barber stayed working (and did not go out on strike) he would earn more than the $65 strike benefit. Afif asked what Barber thought the employees were going to do about a strike.

Barber further testified that he had the following conversation with Afif on May 5, 1982. Barber called to Afif from the picket line and asked why Afif "didn't talk to his buddy [Barber] any more." Barber then asked Afif what had happened to the statement Afif once made to him that, if the Union would keep working under the expired contract, Respondent would have no problem with that. Afif responded by telling Barber to call him on the telephone. Barber made the telephone call later that day and, in that conversation, Afif told him that he did not appreciate the violence that was going on. Afif in that discussion stated that the upgrading of employee jobs would have paid for half of the benefits lost, a matter that the Union was complaining about. That was apparently in reference to Respondent's proposal that the employees pay half of the premiums for medical coverage and for other fringe benefits.

Respondent called Afif to testify respecting the foregoing testimony. Afif's testimony thereon is as follows. Barber worked on the second shift with about seven other employees. Afif talked with Barber on virtually every workday about a variety of matters. Afif could not remember any specific dates in which certain matters were discussed in March 1982. He recalled that, on occasions after he returned from negotiations, Barber had asked him how things were going and that he responded, "slow." He told Barber on one occasion that he was tired because he himself was doing all the talking at the negotiations and that the Union's representative Madore must be tired too since he was doing the talking for the Union. Afif observed that union committeemen Silva and Sturtevant had been pretty quiet. In one of their discussions in March, Barber said to Afif that the employees could not afford to take the cuts being proposed by Respondent and Afif replied that matter was being discussed in negotiations. Afif further recalled that, in a conversation with Barber, Barber asked if the job upgradings were going to take effect and Afif replied he could not talk about it as those matters were being discussed. Afif recalled that, on the day the Union audited Respondent's books, Barber said to him as he walked into the plant that Barber did not know that Respondent was in such bad shape and that Afif replied that that confirmed what he had been saying all along. Afif stated that he probably did, in discussions he had with Barber, refer to the Union as being bullheaded at times.

Afif testified that the only recollection he had of discussing weekend negotiations with Barber was his saying

to Barber that it was great that negotiations were scheduled for Sunday, April 4, and that, as a idle joke, Afif said that he had been trying to get Sunday meetings going earlier. Afif testied that he had no recollection of having disussed strike benefits with Barber.

As to conversations with Barber while Barber was picketing, Afif's testimony is as follows. Barber called him one day in May 1982 while Afif was in the plant and said that he wanted to have an off-the-record discussion with Afif. Afif told Barber that he sounded a little bit drunk and Barber insisted he was not. Afif told him that he would call Barber the following day. He called Barber at home the following day and said they discussed the difficulties of the strike, including some violence that had occurred. Afif did not have any reason to discuss job descriptions with Barber and did not discuss that subject. Afif did not recall ever telling Barber that Respondent would accept a union proposal to keep in force the existing contract.

I credit Afif's testimony that he and Barber had talked every workday about a variety of matters, including some related to the contract negotiations then going on. Barber's own testimony is that he viewed Afif as a "Buddy" and that indicates to me that Barber and Afif often had casual discussions. I am not persuaded that Barber's accounts of those conversations are more likely true than is the testimony given by Afif. It is more probable, in my view, that neither could relate with great precision any particular discussion out of many related or similar conversations. On that premise, I cannot credit Barber's versions.

The General Counsel called Norman DiGiamberdine as a witness in support of the contention that Respondent bypassed the Union and engaged in direct negotiations with unit employees. He testified that on March 4, 1982, Afif asked him what he thought of the circular Afif sent out that day to all unit employees. That circular announced the TV raffle drawing to promote better attendance and also the tuition refund program, discussed earlier herein. DiGiamberdine testified further that on March 26, 1982, Afif told him while at work that DiGiamberdine could make $25,000 a year and that, when he retorted that he had been working 20 hours' overtime each week, Afif answered that that was better than Respondent's bringing in more employees for that overtime work. Afif did not controvert that testimony.

Robert Ziegler, a laboratory employee, testified for the General Counsel that Afif on one occasion asked him if he would like to work in the extrusion department. His testimony also indicates that new laboratory equipment had been brought in and this appeared to have some impact on his job duties and on related grievances. In addition, the General Counsel's brief observes that Respondent then was proposing during contract negotiations that the Union agree to remove laboratory employees from the unit it represents. That proposal was later dropped. Afif did not controvert Ziegler's testimony.

E. *The Alleged Unlawful Refusal to Reinstate the Striking Employees*

The General Counsel contends that the employees represented by the Union have been engaged in an unfair labor practice strike since April 5, 1982, and that Respondent has unlawfully refused to honor their unconditional applications for reinstatement. Respondent maintains that the strike has been purely economic in nature and that, when applications were made on behalf of the striking employees to return to work, it offered the applicants reinstatement to jobs not then filled by permanent replacements.

The testimony is essentially uncontroverted that the Union held a membership meeting on April 5, 1982, after the negotiating session it had had that day with Respondent. At that membership meeting, the Union's representatives reviewed the negotiations with the unit employees and told them that Respondent's final offer was "something less than what [Respondent] had originally offered." The employees were told that the pension plan which had been agreed to in the initial contract had never been put into effect. They reviewed Respondent's claims that it could not afford to give any benefits and noted that at the same time Respondent was giving out birthday cakes and tuition refunds and that it was increasing the number of uniforms. In essence, they informed the employees that Respondent was, in their view, engaged in bad-faith bargaining and they asked for a strike vote. The employees voted unanimously to go on strike.

The pleadings establish that named unit employees struck on April 5, 1982.

On August 27, 1982, the Union's president, Philip Wheeler, delivered a letter to Respondent which stated that the employees were unconditionally offering to return to work under the existing terms and benefits on August 30, 1982. Respondent sent a telegram to the Union on that same date acknowledging that letter and stating that it was reviewing its production schedule and would respond to that offer. On August 31, it did so respond. In that letter it stated that it would reinstate eligible striking employees for those positions currently vacant or available for work beginning Wednesday, September 8, 1982, and that it would notify such employees of the offers of reinstatement. It further advised the Union that, as further positions became vacant or available, Respondent would offer reinstatement to eligible employees.

It was stipulated that Respondent had hired permanent replacements for a number of unit positions and that Respondent offered to reinstate the strikers to the other unit positions.

On September 9, 1982, the Union sent a telegram to Respondent requesting Respondent to clarify Respondent's offer. The Union asked Respondent if its offer to those employees who received certified letters on September 1 applied only to them or to all employees on strike.

On September 10, 1982, Respondent sent a telegram to the Union's president. In essence Respondent stated therein that it sent letters on September 1 to seven strikers offering them reinstatement on September 8. Apparently none reported for work then. On September 8, Respondent wrote nine other strikers to offer them reinstatement as of September 15. None of those nine strikers

reported. Respondent informed the Union that it would continue to offer reinstatement to "eligible employees" as positions became vacant.

Thereafter, offers of reinstatement were made at various dates to the remainder of the striking employees.

F. *Negotiations Since the Start of the Strike*

Representatives of the Union and of Respondent met six times after the strike began. These were mediation sessions conducted by the Department of Labor of the State of Connecticut. Neither side modified their respective demands. At the April 16, 1982 session, Respondent informed the Union that it would put into effect its proposal to cease paying all the medical insurance premiums and to require that unit employees pay 50 percent of that premium. That change has since then taken effect.

G. *Analysis*

1. In general

The General Counsel's brief stresses the background collective bargaining since the signing of the initial contract between Respondent and the Union. This approach is used by the General Counsel to point up what he views as the disparate way Respondent dealt with its employees in relation to its dealings with the Union's officials. In that regard, the record in this case indicates that, since the signing of the April 4, 1979 contract, Respondent was uncooperative with respect to the Union's efforts to adjust numerous unresolved grievances; that Respondent evidenced a similar lethargic response towards the Union's urgent efforts to make progress on a pension plan for the unit employees; and that Respondent for almost 3 years failed to supply appropriate uniforms to the unit employees. In that interval, it certainly did not seem to someone not privy to Respondent's books that Respondent was cutting cutting back on its corporate lifestyle. Thus, it moved to a brand new building in 1980; its officials were taking trips overseas on a much more frequent basis than previously; and it turned over to two former shareholders over $1 million of its assets. When Respondent's president claimed in 1981 that Respondent was in poor financial shape, he at the same time refused the Union's request then that it be allowed to look at Respondent's books to verify that claim. The record in this case contains written appeals to the employees to cooperate with Respondent. They were told more than once that the doors of Respondent's officials were open to them, and that the "we versus they syndrome must be eliminated." In early 1982, its newly hired vice president went out of his way to adjust the employees' immediate problems then. Hovering about, during many of the foregoing events, is the remark of Respondent's president to officials of the Union that Respondent would not have to worry about union grievances or the like when the contract with the Union ran out in April 1982.

In contrast to the small and friendly tokens given employees by Respondent in early 1982 in the form of birthday cakes and otherwise is the forbidding presentation it made to the union officials at the second negotiating session and its related demand for substantial givebacks.

Respondent's brief emphasizes that Respondent made full disclosure of its financial condition, considered the Union's proposals, offered counterproposals, made concessions (e.g., in upgrading many of the unit jobs), and met many times with the Union before and after the contract expired towards resolving differences. The General Counsel sought to neutralize those considerations by urging that Respondent's offer on April 5, 1982, was substantially less than its April 2, 1982 proposal. I find no merit in that contention as those two offers were premised on different bases. The April 2 offer was framed in the context of employee productivity. The Union rejected that approach and urged instead a 1-year extension of the then existing contract. The April 5 counterproposal by Respondent was addressed to that contract-extension proposal and had no relation to the productivity goals towards which its prior proposal was aimed.

The argument made by the General Counsel appears to be "bottomed primarily" on the view of collective bargaining from the standpoint of the Union's officials. The Board recently had occasion to reject that approach in evaluating whether an employer had complied with its duty to bargain in good faith.[3] The inquiry into good faith "involves a finding or motive or state of mind which can only be inferred from circumstantial evidence."[4] That determination is based on reasonable inferences drawn from the totality of the parties' conduct at, and away from, the bargaining table.[5]

2. The pension plan discussions

The first bad-faith violation encompassed by the complaints in this case is alleged to have occurred on May 7, 1981, and pertains to negotiations on the subject of a pension plan. At the meeting on that date, Respondent proposed at the outset to reduce the pension plan survivorship option from 60 percent to 50 percent. In two previous drafts prepared by Respondent's pension plan attorneys, they used the 60-perecent figure set out in the original UAW outline, incorporated in the 1979 contract. No explanation was offered as to why Respondent on May 7, 1981, proposed a reduction in that option. The credited evidence discloses that the Union rejected the proposal on the ground that the 60-percent figure had already been agreed on and thus was nonnegotiable. The Union then stated that it would file an unfair labor practice charge against Respondent and Respondent's representative thereupon terminated the meeting. Seven months later the Union broached the pension plan subject again with Respondent, that time with its legal counsel, and thereafter the subject was handled as part of the renewal contract negotiations. In overall context, I note that, prior to the advent of the Union, Respondent had a profit-sharing plan and that, in that 1982 negotiation, it sought to revert to such an arrangement in place of a

[3] *Chevron Chemical Co.*, 261 NLRB 44 (1982).
[4] *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 140 (1st Cir. 1953).
[5] *Smith's Complete Market*, 237 NLRB 1424, 1438 (1978); *Akron Novelty Mfg. Co.*, 224 NLRB 998, 1001 (1976).

pension plan along UAW lines which guarantees specified benefits.

The General Counsel is not urging, as to the pension plan discussion, that Respondent was bound to the 60-percent option figure by reason of the provisions in the 1979 contract. Rather, it appears to me that the General Counsel's argument is that Respondent's mind was set against any agreement other than a profit-sharing arrangement and that Respondent engaged in unfair bargaining to frustrate the Union's efforts to negotiate a pension plan. The General Counsel may be asserting that Respondent's survivorship proposal and the sudden closing of the May 7, 1981 meeting by Respondent's negotiator then, its vice president Meek, constituted a violation of Section 8(a)(5). If so, I must reject that view as the evidence is insufficient to establish that that conduct per se is violative of the duty to bargain collectively.[6] At best, the actions of Meek then may suggest that Respondent was looking for some basis to end the discussion in a summary manner in furtherance perhaps of a plan to frustrate negotiation towards a pension plan. A violation cannot be premised on a speculation, especially where as here the union representatives had made it clear that in its view the plan or at least a significant aspect of it was nonnegotiable. There are also the following considerations to be taken into account in evaluating whether or not Respondent engaged in bad-faith bargaining as to the pension plan proposal.

I find at length that the evidence overall is insufficient to support a finding that Respondent negotiated in bad faith with the Union respecting its pension plan.

The language of that April 4, 1979 contract gave Respondent "approximately" a year to present the Union with a draft of a pension plan along UAW lines. Respondent took 15 months. The Union, 3 months later, suggested revisions. Further discussion resolved certain of the Union's objections. When the parties met on May 7, 1981, to discuss the remainder, the Union stated that, as to the first one, there would be no negotiations on it. That effectively ended that meeting. Seven months later, the Union brought up the matter anew with Respondent's attorney. In the ensuing contract negotiations, Respondent explained that it was in no financial position to incur fixed pension contribution costs. It backed that up by giving its books to the Union to audit. The audit confirmed that Respondent was in a precarious financial condition. Respondent nonetheless offered the Union a pension plan of its choice as long as contributions would come out of profits.

3. Surface bargaining in the contract renewal negotiations

The main assertion of the General Counsel is that the 1982 contract negotiations were but surface bargaining on Respondent's part. In support of that assertion, the General Counsel cites the alleged direct dealing with unit employees and the further claim that Respondent's last offer prior to the strike was significantly less in value than its previous offer. I have already considered and rejected the claim that Respondent's April 5 proposal was less than its April 2 offer. I turn now to the claim of alleged direct dealing and related matters.

When Respondent hired Rafat Afif in January 1982 as vice president responsible for plant operations, there were long simmering issues raised by the Union's repeated claims that Respondent was letting unresolved grievances accumulate and that it was stalling in setting up job classifications and in addressing itself to other matters of concern to the unit employees. The credited evidence is that Afif met with the Union's shop chairman and its grievance committeemen to explore with them the depths of the problems and to cooperate with them in solving them. The credited testimony discloses that Afif consulted fully with the Union's shop chairman and its other employee representatives respecting the matters of plant uniforms, attendance incentives (the TV raffle), birthday cakes, and tuition refunds. Respondent did not, in negotiating with the Union's shop chairman and its committeemen thereon, seek to undermine the Union but in fact bargained collectively with it.[7]

The evidence bearing on the negotiations that took place in 1982 between Respondent and the Union discloses that Respondent met very frequently with the Union, considered the proposals put forth by the Union, submitted counterproposals, made more than a few concessions, offered to document and did document its reasons for seeking givebacks, and revised its proposals to reflect the Union's expressed concerns in attempts to obtain the Union's consent as to the revisions, and that Respondent at no time took an intransigent position on any specific item but rather kept a flexible approach to explore areas of potential agreement. In these circumstances, the evidence does not permit an inference that Respondent engaged in surface bargaining in order to avoid agreement on the terms of a renewal contract with the Union.

4. Conduct away from the bargaining table

Other asserted unlawful conduct which occurred away from the bargaining table and which purportedly has a bearing on Respondent's good faith in the negotiations consists of Afif's discussions with employees Clayton Barber, Robert Ziegler, and Norman DiGiamberdine. Based on the discussions earlier in this decision, it is clear that Afif's conversations with Barber were routine in nature and it appears that they were initiated as much by Barber, a union steward and committeemen, as by Afif. I find nothing coercive in Afif's asking DiGiamberdine about the notice Afif issued on March 4 concerning the TV raffle and the tutition refund program. Lastly, Afif's asking Ziegler if he liked to switch from laboratory work to production work may have been intended to lay the groundwork for Respondent's later proposal during negotiations to remove laboratory and sample employees from the bargaining unit. In and by itself however, the questioning cannot be deemed coercive. Further, I note that Respondent dropped its proposal to restructure the scope of the bargaining unit.

[6] Cf. *Parkview Nursing Center II Corp.*, 260 NLRB 243 fn. 3 (1982).

[7] *Triplex Oil Refining Division*, 194 NLRB 500 (1971).

I find that Afif's discussions with Barber, DiGiamberdine, and Ziegler were noncoercive.[8]

5. Conclusions

The actual conduct of the negotiations in 1982, including Afif's dealings with the Union's shop chairman and its committeemen regarding uniforms and the other matters they discussed, and including the conduct away from the bargaining table and the absence of any independent evidence of union *animus*, demonstrates that Respondent pursued a hard bargaining course dictated by its difficult economic position and reveals insufficient evidence to support a finding of bad-faith bargaining.[9]

In making the foregoing determination, I have taken into account the background evidence and other matters relied on by the General Counsel which was highlighted at the outset of this section of my decision. Those considerations could readily permit a finding that Respondent's acts from mid-1979, and up to the second negotiating session in 1982, were in good part responsible for a lack of faith by the unit employees and the union representatives in Respondent's dealings with them and for their views that Respondent had long since embarked on a campaign to rid itself of the Union and that it sought substantial givebacks in furtherance of such a goal. Those considerations do not outweigh the totality of the evidence on which I have also found that Respondent bargained in good faith for a renewal contract. Although not expressly articulated but nonetheless alluded to in different ways, I have taken into account the possibility that Respondent may be held chargeable with having pursued a course of conduct for so long as to have in essence misled the Union to the point where it may have been compelled to strike. That concept is not envisioned by the Act. Rather, and as noted above, the controlling element is the matter of Respondent's good faith and not the Union's perception thereof.

The General Counsel separately contends that Respondent unilaterally changed the medical and surgical plan governing unit employees by its having put into effect after the strike started its proposal thereon as made to the Union just before the strike began. As an impasse existed and as there is no evidence that the impasse was brought about by any bad-faith bargaining by Respondent, it was free to put that change into effect, as it did.[10]

The allegation that Respondent unlawfully failed and refused to reinstate the striking employees on their unconditional application therefor is grounded in the General Counsel's claim that they were, since April 5, 1982, engaged in an unfair labor practice strike. As I have found no unfair labor practices on Respondent's part, I conclude that the strike had been economic since its inception and that there is no evidence, or contention, that Respondent treated economic strikers discriminatorily.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization as defined in the Act.

3. Respondent did not fail or refuse to bargain collectively with the Union in violation of Section 8(a)(1) and (5) of the Act, did not refuse to reinstate striking employees in violation of Section 8(a)(1) and (3) of the Act, and did not in any other way engage in conduct proscribed by Section 8(a)(1) of the Act.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The complaints are dismissed.

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[8] *Television Wisconsin, Inc.*, 224 NLRB 722, 765 (1976).

[9] *Chevron Chemical Co.*, 261 NLRB 44 at fn. 3.

[10] *Taylor-Winfield Corp.*, 225 NLRB 457, 463 (1976).

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.